
The Identification of Water Bodies that will qualify for Marginal Strips

Guideline



Department of Conservation
Te Papa Atawhai

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I. Purpose of this guideline

This guideline is intended to assist surveyors to identify water bodies that will qualify for marginal strips when the Crown is disposing of the adjoining land.

It is based on the Department of Conservation's interpretation of the relevant provisions of the Conservation Act 1987 but it is not intended as a substitute for the legislation or legal advice.

II. About this document

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Amendments

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Terminology and definitions

1. Introduction

The marginal strips retained by the Crown when it disposes of land are an important component of the means of providing for public access to and along waterways and lakes. They also serve particular conservation purposes along the margins of those water bodies and in relation to water quality.

The purposes of marginal strips are set out in Section 24C of the Conservation Act 1987, a copy of which is attached as an Appendix to these guidelines.

Improving the identification of marginal strips is in the interest of both the public and the adjoining landowners. The Crown decided that from 1 July 2007 marginal strips will be depicted on plans at the time the Crown disposes of land and that those plans will be incorporated in the public record.

Surveyors are required to prepare those plans and these guidelines have been prepared as an aid to the identification of the water bodies that will qualify for marginal strips. In addition the Surveyor-General has published a ruling for surveyors for the representation of movable marginal strips on survey plans.

2. The legislative requirements

The idea that the Crown should retain strips of land along the coast and the margins of rivers and lakes in the public interest has been reflected in legislation since the 1890s.

The current legislative requirements are set out in Part 4A of the Conservation Act 1987, which was incorporated into the Act in 1990.

The key provisions for the creation of marginal strips are set out in Sections 24(1) and (2) as follows :-

“ (1) There shall be deemed to be reserved from the sale or other disposition of any land by the Crown a strip of land 20 metres wide extending along and abutting the landward margin of

(a) Any foreshore; or

(b) The normal level of the bed of any lake not subject to control by artificial means; or

(c) The **bed** of any river or any stream (not being a canal under the control of a State enterprise within the meaning of section 2 of the State-Owned Enterprises Act 1986 and used by the State enterprise for, or as part of any scheme for, the generation of electricity), **being a bed that has an average width of 3 metres or more.**

(2) There shall be deemed to be reserved from the sale or other disposition by the Crown of any land extending along and abutting the landward margin of any lake controlled by artificial means a strip of land that—

(a) Is 20 metres wide; or

(b) Has a width extending from the maximum operating water level to the maximum flood level of the lake, —

whichever is the greater.”

In the Act “lake” means a body of fresh water whose bed has an area of 8 hectares or more and which is entirely or nearly surrounded by land and “foreshore means” such parts of the bed, shore, or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at mean spring tides.

These guidelines focus mainly on the identification of qualifying rivers or streams and the significant words “bed” and “being a bed that has an average width of 3 metres or more” have been emphasised because they are the key matters that need to be taken into account in determining whether a river or stream within the area being disposed of will qualify for marginal strips.

Section 2(1) of the Conservation Act 1987 defines “bed” to mean -

“(a) In relation to any river, the space of land which the waters of the river cover at its **fullest flow without overtopping the banks**; and

(b) In relation to a lake, the space of land which the waters of the lake cover at its highest level without exceeding its physical margin”

Note that the bed of a river (and by implication any stream) is defined in terms of the fullest flow that does not overtop the banks. The bed as so defined can be wider than the area covered by water at any particular time, such as during periods of low flow or when water is being taken for irrigation.

Surveyors will be expected to identify the bed that will be covered at fullest flow by looking for the physical evidence of the extent of that bed in the same way that they would look for evidence when determining any other natural water boundary. It will be necessary to consider such matters as vegetation change and the existence of previously eroded banks.

Judgement will need to be exercised where there is a significant expanse of shingle between the waters edge and the bank represented by consolidated vegetated ground. This is particularly the case with braided rivers.

It should be noted that the definition does not specify when the “fullest flow without overtopping the banks” may occur.

3. The identification of beds for assessment

In this guideline the term “waterway” will be used to refer to the rivers or streams that should be assessed and it is the width of the beds of those waterways that is the key feature of the assessment.

It should be noted that it is the bed of the waterway within or adjoining the land being disposed of that must be considered for the purposes of applying the averaging rule. It is not considered appropriate to allow the characteristics of the waterway outside the boundaries of the land being disposed of, or which do not apply to that part of the waterway adjoining the land, to enter into the averaging exercise.

In the case of a single major waterway flowing through the section or parcel or adjoining it (i.e. where the waterway forms the boundary of the land), it should be a relatively simple exercise to determine the extent and location of marginal strips. If the entire waterway has a bed width at fullest flow of three metres or more, then the entire length qualifies. If the waterway bed width varies above and below three metres, averaging is applied.

The identification of qualifying waterways becomes more complicated in the case of large areas with numerous waterways or a waterway that has numerous branches or tributaries. In such cases it is necessary to identify the main branch of the waterway and the various subsidiary branches and tributaries and consider the bed of each separately. Those branches and tributaries that are clearly less than 3 metres wide for their entire length may be disregarded, while those that do have widths of 3 metres or more must be assessed.

The main branch of the waterway must be assessed to determine that part which has an average width of 3 metres, ignoring the separately assessed subsidiary branches and tributaries. That assessment should continue until the waterway passes out of the area being disposed of or divides into branches and tributaries that are each clearly less than 3 metres wide.

The department considers that braided rivers present a special case and surveyors will have to exercise their judgement to determine the location of the banks and the true extent of the land being considered for disposal. The department does not expect that the Crown will contemplate the disposal of the beds of such rivers and that therefore the individual channels that make up the flow of a braided river, at any particular time, may be treated collectively as a single waterway for the purposes of assessing the width of the bed. While the individual channels may be mobile across the bed of the river there will be identifiable banks adjoining the gravel bed of the river which identify the margins of the river bed at fullest flow

4. Averaging

The inclusion of the word "average" in the definition of the width of the bed of a river or stream in the legislation clearly means that a waterway can qualify for marginal strips despite the fact that some sections of the bed may be less than 3 metres wide.

A robust and commonsense approach should be taken to the averaging exercise. This is particularly the case in assessing the main branch of a waterway. A waterway that has a few short sections that are less than 3 metres bed width, but is over 3 metres for the majority of its length, can average out as qualifying for its entire length. A waterway that is over 3 metres bed width in a few places, but has just less than 3 metres bed width along most of its length, will fail to qualify in its entirety.

A waterway, that is significant enough to be assessed, may dwindle to less than 3 metres bed width going upstream to the land boundary, but may still average 3 metres bed width or more if most of its length within the area being disposed of is over 3 metres in width. Such a waterway can qualify for its entire length, under the averaging approach.

5. Lakes and the foreshore

For the purposes of deciding whether a lake is 8 ha or more the boundaries should be determined by locating the lake margin using the usual evidence for locating such natural boundaries. If the lake adjoins the area being disposed of the whole area of the lake must be taken into account to determine its size for the purpose of determining whether marginal strips will be created around that part of the lake adjoining the area.

The Conservation Act 1987 defines the foreshore as “such parts of the bed, shore, or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at mean spring tides” so surveyors will need to determine the position of the landward boundary of that area using whatever evidence may be available. The Surveyor-General published an advisory note in July 2004 regarding the determination of mean high water springs which is available on the Land Information New Zealand web-site.

6. Appendix

6.1 EXTRACT FROM THE CONSERVATION ACT 1987

24C Purposes of marginal strips

Subject to this Act and any other Act, all marginal strips shall be held under this Act—

(a) For conservation purposes, in particular—

(i) The maintenance of adjacent watercourses or bodies of water; and

(ii) The maintenance of water quality; and

(iii) The maintenance of aquatic life and the control of harmful species of aquatic life; and

(iv) The protection of the marginal strips and their natural values; and

(b) To enable public access to any adjacent watercourses or bodies of water; and

(c) For public recreational use of the marginal strips and adjacent watercourses or bodies of water.